IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

ALBERT DALE LEWIS,
Appellant.

No. 2 CA-CR 2012-0404
Filed May 12, 2014

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
NOT FOR PUBLICATION
See Ariz. R. Sup. Ct. 111(c); Ariz. R. Crim. P. 31.24.

Appeal from the Superior Court in Pima County
No. CR20113758002
The Honorable Christopher C. Browning, Judge

AFFIRMED IN PART; VACATED IN PART

COUNSEL

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MEMORANDUM DECISION

Presiding Judge Vásquez authored the decision of the Court, in which Chief Judge Howard and Judge Miller concurred.

V Á S Q U E Z, Presiding Judge:

¶1 After a jury trial, Albert Lewis was convicted of unlawful imprisonment, assault, aggravated robbery, burglary in the second degree, and aggravated assault on an incapacitated victim. The trial court sentenced him to a combination of consecutive and concurrent, aggravated prison terms totaling 17.5 years. On appeal, Lewis argues the court erred by denying his motion to suppress evidence and by entering a criminal restitution order (CRO). For the following reasons, we vacate the CRO but otherwise affirm.

Factual and Procedural Background

¶2 We view the facts and all reasonable inferences therefrom in the light most favorable to sustaining Lewis's convictions. *See State v. Haight-Gyuro*, 218 Ariz. 356, ¶ 2, 186 P.3d 33, 34 (App. 2008). On a late evening in October 2011, D.H. was home alone when a male intruder, later identified as Lewis, kicked down her kitchen door and "tased" her. Lewis moved D.H. to the family room, covered her eyes and mouth with duct tape, and bound her wrists. He demanded money and began searching her house for valuables.

¶3 Although she could barely see from "underneath the duct tape," D.H. noticed that Lewis was accompanied by a woman, who she recognized as a friend, Amy Gustafson. D.H. called out to Gustafson but was tased again. Lewis subsequently carried D.H. to her bedroom, tied her to the bed, turned off the lights, and shut the door. D.H. waited until she no longer heard any noises in the house, freed herself, and called 9-1-1. She discovered that various

electronic items, her purse, some medication, and several pieces of jewelry were missing.

¶4 Officers obtained a warrant to search Gustafson's residence where they found some of D.H.'s belongings and a "Taser" stun gun. Gustafson was arrested and, during recorded jailhouse telephone calls and visits, discussed a Taser and her friend "Albert," who she claimed was trying to set her up. Tucson Police Department Detective Roger Baldwin subsequently obtained Gustafson's cellular telephone, which contained text messages exchanged with Lewis a few hours before the incident in which they had discussed visiting "[D.]" A second search of Gustafson's residence revealed bank records belonging to Lewis. Baldwin issued a "stop and arrest flyer" for Lewis, pursuant to which he was arrested.

¶5 Lewis was charged with kidnapping, aggravated assault involving a deadly weapon or dangerous instrument, aggravated robbery, burglary in the second degree, and aggravated assault on an incapacitated victim. Before trial, Lewis filed a motion to suppress "all evidence obtained from [his] arrest," arguing the officers lacked probable cause to arrest him. After a hearing, the trial court denied the motion. The court explained:

> Here, police had reasonably trustworthy information that a felony had been committed. The investigation of the home invasion provided significant evidence that multiple felonies had been committed. Further, the investigation of . . . Gustafson, coupled with the description given to police by the victim, provided trustworthy information for police to believe that [Lewis] had committed the home invasion.

¶6 At trial, the court granted Lewis's motion for a directed verdict as to the deadly weapon or dangerous instrument element of the aggravated assault charge. The jury found Lewis guilty of

unlawful imprisonment, the lesser-included offense of kidnapping, and the remaining charges. He was sentenced as described above. This appeal followed. We have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(1), 13-4031, and 13-4033(A)(1).

Motion to Suppress

¶7 Lewis contends the trial court erred by denying his motion to suppress. We review the denial of a motion to suppress evidence for an abuse of discretion. *State v. Fikes*, 228 Ariz. 389, ¶ 3, 267 P.3d 1181, 1182 (App. 2011). We consider only the evidence presented at the suppression hearing, viewing it in the light most favorable to upholding the trial court's ruling. *State v. Nelson*, 208 Ariz. 5, ¶ 4, 90 P.3d 206, 207 (App. 2004). However, we review de novo a court's legal conclusions, including the existence of probable cause to support an arrest. *State v. Moran*, 232 Ariz. 528, ¶ 8, 307 P.3d 95, 99 (App. 2013).

¶8 An officer may make a warrantless arrest "if the officer has probable cause to believe . . . [a] felony has been committed and probable cause to believe the person to be arrested has committed the felony." A.R.S. § 13-3883(A)(1). When officers act pursuant to a flyer to conduct a stop or make an arrest, the relevant inquiry is whether the officer who issued the flyer had the requisite probable cause at the time he or she issued it. *State v. Hein*, 138 Ariz. 360, 363, 674 P.2d 1358, 1361 (1983). Probable cause is something less than proof beyond a reasonable doubt but more than mere suspicion. *State v. Aleman*, 210 Ariz. 232, ¶ 15, 109 P.3d 571, 576 (App. 2005). "When assessing whether probable cause exists, 'we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act.'" *State v. Dixon*, 153 Ariz. 151, 153, 735 P.2d 761, 763 (1987), *quoting Brinegar v. United States*, 338 U.S. 160, 175 (1949).

¶9 Lewis argues "[t]he investigation of . . . Gustafson coupled with [D.H.]'s description did not provide trustworthy information for police to believe [he] committed the home invasion." In particular, he points out that D.H.'s description of the male

intruder does not match his description. D.H. described the man as "5-11, 180 pounds" and in his "early 30s," while at the suppression hearing Baldwin described Lewis as "6-2, 200 pounds" and a "well preserved," forty-seven year old. D.H. testified that she only had a "very short glimpse" of the intruder before he covered her eyes. But physical descriptions need not perfectly match to support a finding of probable cause. *See State v. Lawson*, 144 Ariz. 547, 553, 698 P.2d 1266, 1272 (1985) (cars "similar in description" supported probable cause for arrest); *State v. Williams*, 182 Ariz. 548, 557, 898 P.2d 497, 506 (App. 1995) (variation in defendant's height and weight did not "negate probable cause").

¶10 Lewis also asserts the "paperwork, not connected to this case, found in . . . Gustafson's residence should not be considered" in the probable cause determination. Lewis similarly contends the text messages he exchanged with Gustafson should not be considered because, even though Gustafson asked him to "visit [D.]," there is no evidence that he did. But, in reviewing whether probable cause exists, courts consider the totality of the facts and circumstances known to the officers at the time of the arrest. *Lawson*, 144 Ariz. at 553, 698 P.2d at 1272; *State v. Keener*, 206 Ariz. 29, ¶ 15, 75 P.3d 119, 122 (App. 2003). We are aware of no authority, and Lewis has directed us to none, for the proposition that this evidence, known to Baldwin at the time he issued the stop and arrest flyer, should nonetheless be excluded from the probable cause determination.

¶11 In sum, we agree with the trial court's conclusion that probable cause existed to arrest Lewis. *See Moran*, 232 Ariz. 528, ¶ 8, 307 P.3d at 99. There was evidence that several felonies had been committed during the home invasion. *See* A.R.S. § 13-3883(A)(1). According to D.H., a man, who was assisted by Gustafson, kicked down her door, tied her up, tased her repeatedly, and took her belongings. And, there was evidence that Lewis had committed those felonies. *See id.* A few hours before the incident, Gustafson and Lewis exchanged text messages in which they discussed visiting "[D.]" While in jail, Gustafson discussed "Albert" and a Taser. Additionally, Gloria Bradley, who had been in a relationship with Lewis, pawned D.H.'s stolen jewelry the day following the incident.

Therefore, the trial court did not abuse its discretion by denying Lewis's motion to suppress. *See Fikes*, 228 Ariz. 389, ¶ 3, 267 P.3d at 1182.

Criminal Restitution Order

¶12 Lewis also argues the trial court's imposition of a CRO constitutes an illegal sentence that must be vacated. We agree. At sentencing, the court ordered that "all fines, fees, assessments and/or restitution are reduced to a [CRO], with no interest, penalties or collection fees to accrue while [Lewis] is in the Department of Corrections." "[T]he imposition of a CRO before the defendant's probation or sentence has expired 'constitutes an illegal sentence, which is necessarily fundamental, reversible error.'" *State v. Lopez*, 231 Ariz. 561, ¶ 2, 298 P.3d 909, 910 (App. 2013), *quoting State v. Lewandowski*, 220 Ariz. 531, ¶ 15, 207 P.3d 784, 789 (App. 2009). This is so even when, as here, the trial court delays the accrual of interest. Nothing in A.R.S. § 13-805,[1] which governs the imposition of CROs, "permits a court to delay or alter the accrual of interest when a CRO is 'recorded and enforced as any civil judgment' pursuant to § 13-805(C)." *Lopez*, 231 Ariz. 561, ¶ 5, 298 P.3d at 910.

Disposition

¶13 For the foregoing reasons, we vacate the CRO but otherwise affirm Lewis's convictions and sentences.

[1]Section 13-805 was amended in 2012 to "permit a court to enter a CRO at sentencing in certain circumstances." *State v. Cota*, 234 Ariz. 180, ¶ 8, 319 P.3d 242, 245 (App. 2014). But Smith committed these offenses and was sentenced before the effective date of the amendment. *See id.* n.4; 2012 Ariz. Sess. Laws, ch. 269, § 3.